Property Rights: Are There Any Left?

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I. Introduction: The Demise of Property Rights in Urbania

THE INCREASING INTRUSIVE NATURE OF GOVERNMENT—particularly federal government—into private affairs has led inescapably to a decline in the quality and extent of private property rights in the United States. This is neither novel nor surprising. Land-use controls in the United States generally had their genesis in the cities, where one person's use of land could more easily affect that of a neighbor. This generated a tendency, if not a need, to look to government for a remedy.[1] Therefore, as our society has become more urban, the level of government intrusion into private property rights increased. What follows is a brief overview of how that intrusion has become manifest in three particular areas in the past decade:

1. Federal Land Policy,
2. Eminent Domain,
3. Regulation/Taking/Compensation Issue.

The unifying thread in those comparatively disparate land categories is the central role of the courts—particularly, though not exclusively, the federal courts. It is in the courts that the nature of the federal government intrusion is defined—and at times limited—where the struggle over freedom from that intrusion is resolved as either a taking requiring compensation or a regulation requiring nothing.[2] Until well into this century, courts had held that physical takings required both a clearly

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1. F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 1-2 (1972); D. CALLIES & R. FREILICH, CASES AND MATERIAL ON LAND USE ch. 1 (1986).

2. *See* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985), for a view that both regulation and eminent domain are takings, but of different kinds and leading to different solutions.

defined public purpose and compensation, whereas regulation, if clearly founded on the exercise of the police power, never required compensation, no matter how intrusive.[3] However, the blurring of these clear distinctions has resulted in greater intrusion of government into private rights in property, despite decisions which appear on their face to protect them. Perhaps the most significant blurring has occurred between the police power and the public use requirement, as one distinguished scholar has clearly put it, "the police power is surely not as expansive as the public use requirement, from which it is almost never distinguished in modern law."[4]

II. Federal Government and the Erosion of Property Rights

The "federalization" of land-use controls is a well-known phenomenon,[5] an example of federal incursion into areas in which the federal government was not meant to go. Indeed, so strong has the reaction against "federalization" generally become that the Section on Urban, State and Local Government Law of the American Bar Association (ABA) has proposed a resolution to the ABA's House of Delegates urging the federal government to curb its abuse of power in all three branches of government.[6] Not so well documented is the incursion of federal government authority into private land affairs coupled with a decrease in private land activities permitted on federal land, thereby increasing federal preemption of state and local land planning and control regulations, and the militancy of certain agencies in designating activity zones that have had a blighting effect on private land development.

A. *Public Lands/Public Preserve: Closing to Private Use?*

The federal government owns approximately 740 million acres of land in the United States.[7] Nearly 400 million of those acres are administered by the Bureau of Land Management (BLM) under the Federal Land

3. *See* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL (1973).

4. Epstein, *An Outline of Takings*, 41 U. MIAMI L. REV. 12 (1986).

5. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 525, 527 (1975).

6. *Federalism Resolution* and *Federalism Report* (April 1987) (draft) submitted to the ABA House of Delegates (June, 1987). *See Symposium: Federalism In the Bicentennial Year of Our Constitution*, 19 URB. LAW. 443 (1987); Freilich, Montello & Mueth, *The Supreme Court and Federalism*, 18 URB. LAW.779 (1986).

7. Comment, *The Sale of Fort DeRussy: An Analysis of the Reagan Administration's Federal Land Sales Program*, 7 U. HAW. L. REV. 105, 106 (1985).

Management and Policy Act of 1976 (FLMPA).[8] Other lands administered by the federal government include lands located on the outer continental shelf (OCS) and lands held for the benefit of Indians, Aleuts, and Eskimos.[9] Much of the early 1980s literature has focused on the Reagan Administration's ill-starred plan to dispose of federal lands as a matter of fiscal policy under the Federal Property and Administrative Services Act (FPASA).[10] As recent court cases clearly indicate, it has been FLMPA with its emphasis upon the planning and retention of federal lands and away from private use and disposal that represents the real shift in policy.

1. THE EROSION OF PRIVATE RIGHTS IN PUBLIC PARKS

In the early 1900s, private holdings—both leasehold and freehold—were common in our national parks and national forests. Congress authorized the leasing of cabins and other sites by statute in Glacier National Park, Lassen Volcanic National Park, Yosemite National Park, and Indiana Dunes National Park.[11] In Yosemite, private uses included houses, seasonal residences, mobile homes, rental cabins, a hotel, a grocery store, and a gas station.[12] Although leasing in some of the parks—particularly Glacier—has been prohibited since 1931, it was not until the 1950s and 1960s that the federal government departed from its policy of leasing sites on most of its lands, including Forest Service lands. Now, apparently, it is the Service's goal to eliminate leaseholds on its lands altogether.[13] This shift in policy was so obvious that the Ninth Circuit Court of Appeals was led to remark in *Idaho v. Hodel*[14] that:

> The evidence that leasing practices historically were considered to be proper park uses is sufficient to conclude that Idaho has *clearly* violated the "public park" restriction [in a grant to Idaho] for a state park, made in part from Indian lands held by the federal government, a tiny portion of which was leased for vacation cabins to private parties.[15]

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8. 43 U.S.C. §§ 1701-1782 (1976).
9. Comment, *supra* note 7, at 106; 43 U.S.C. § 1702(e) (1982).
10. 40 U.S.C. §§ 471-492 (1982); *see* Note, *Sales of Public Land: A Problem in Legislative and Judicial Control of Administrative Action*, 96 HARV. L. REV. 927 (1983).
11. Idaho v. Hodel, 814 F.2d 1288 (9th Cir. 1987); *see also* Lambert, *Private Landholdings in the National Parks: Examples From Yosemite National Park and Indiana Dunes National Lakeshore*, 6 HARV. ENVTL. L. REV. 35 (1982).
12. *Hodel*, 814 F.2d at 1295.
13. *Id.*
14. 814 F.2d 1288 (9th Cir. 1987).
15. *Id.*

In *Hodel*, the use of less than 1 percent of Heyburn State Park for private parties on leaseholds was alleged to be a sufficient violation of the public park stipulation in the federal government's grant to Idaho that plaintiffs sought a forfeiture of the land under a power of termination. The court denied relief.

At first blush the idea of private use of public lands, at least in public parks, seems to offend sensibilities of what is public and what is private. Bear in mind though, that until recently the federal government permitted all manner of state and local regulation as well as the private use of public lands.[16] What has occurred also has affected the attempts of local governments to continue to assert controls over federal lands and activities on federal lands affecting, for example, private lands in the coastal zone.

2. THE SUNSET OF STATE AND LOCAL LAND-USE CONTROLS OVER FEDERAL LAND

Traditionally, local and state land regulations have applied to federal lands in a policy which can only be described as schizophrenic in light of the foregoing discussion. Private parties fortunate enough to obtain or retain permission to use federal lands for private purposes increasingly have started to utilize the federal government as a shield against contrary state and local land-use controls. The power to legislate to protect public lands has never seriously been questioned, at least since the Supreme Court decided *Camfield v. United States* in 1897[17] and *Kleppe v. New Mexico* in 1976.[18] Congress, however, as proprietor, always has had the authority to legislate to protect federal property under the property clause of the Constitution.

Based largely on the preceding two cases, the Court of Appeals for the Ninth Circuit decided in *Ventura County v. Gulf Oil Corporation*[19] that county zoning laws could not require a private party to obtain permits to drill in a National Forest once the BLM granted leases for oil exploration and development. The court held that "the local ordinances imper-

16. *See generally* BAYNARD, PUBLIC LAND LAW AND PROCEDURE chs. 3, 4 & 8 (1986). *See* D. CALLIES & R. FREILICH, *supra* note 1, at ch. 10, § F and cases cited therein; Anderson, *Public Land Exchanges, Sales and Purchases Under the Federal Land Policy and Management Act of 1976*, 4 UTAH L. REV. 657 (1979); Laitos & Westfall, *Government Interference With Private Interests in Public Resources*, 11 HARV. ENVTL. L. REV. 1 (1987).

17. 167 U.S. 518 (1897).

18. 426 U.S. 529 (1976).

19. 601 F.2d 1080 (9th. Cir. 1979).

missibly conflict with congressional regulation of Gulf's activities on government land.''[20]

In an entirely different context, but demonstrating the same general philosophy, the same court held in *Juan Segundo v. City of Rancho Mirage*,[21] that a local rent control ordinance could not be applied to a mobile home park operated by a private and non-Indian entity on land located entirely within an Indian reservation. Such regulations were held to be preempted by federal law, given the backdrop of tribal sovereignty coupled with the comprehensive regulatory scheme of the federal government governing the leases of Indian land.[22]

Perhaps even more indicative of the pervasiveness of the policy of excluding state land-use controls over federal lands is the recent decision of the Supreme Court in *California Coastal Commission v. Granite Rock Company*.[23] There, a bare majority of the Court concluded that certain permit requirements of the California Coastal Commission (CCC) were enforceable in Los Padres National Forest despite allegations that the state was preempted by BLM regulations and FLMA. The Court drew a distinction between environmental laws, which could *not* be preempted, and land-use planning laws which *could* be preempted. However, even a casual reading of the majority and dissenting opinions indicate the Court was virtually unanimous on one point: if one characterizes the CCC permit requirement as a land-use regulation, it is inapplicable to Granite Rock's activities on federal land as a matter of federal law. The Court appeared to reiterate this view obliquely in its recent revisiting of *Pennsylvania Coal Co. v. Mahon*[24] in *Keystone Bituminous Coal Association v. DeBenedictis*,[25] analyzed in Part IV of this article. In discussing the applicability of the statute designed to ameliorate the effects of potential subsidence, the Court characterized it as reflecting ''the type of environmental concern that has been the focus of so much federal, state and local regulation in recent decades.''[26] The Court thus appeared to be reinforcing its emphasis on environmental, rather than land-use, laws, which it seemed to have somehow relegated to second-class status.

In sum, the Supreme Court has drastically reduced the level and intensity of much private land use in public parks, and continues to permit

20. *Id.* at 1082.
21. 813 F.2d 1387 (9th Cir. 1987).
22. *Id.* at 1393-94.
23. 107 S. Ct. 1419 (1987).
24. 260 U.S. 393 (1922).
25. 107 S. Ct. 1232 (1987).
26. *Id.* at 1236-37.

considerable overlap of state and local land-use controls on what private use is still federally permitted on federal lands.

B. *Airborne Blight: Air Installation Compatibility Use Zones*

One of the latest wrinkles in the erosion of private property rights by federal action is the promulgation of Air Installation Compatible Use Zones (AICUZ) by those units of the Department of Defense (DOD) with military air bases. Promulgated under the authority of the Noise Control Act[27] or the DOD's general authority to maintain installations (in litigation the basis of the authority has been in dispute), the avowed purpose of the AICUZ is to define areas of impact from air facilities operations and then attempt, through procedural and operational changes, to lessen those impacts by reducing the area affected. A second objective is to develop long-range strategies that will prevent or deter encroachment into impacted areas and thus prevent an increase in negative impacts.[28]

It is this second objective that generally causes problems for private landowners, when a branch of the armed services with such an installation promulgates an AICUZ over private land, usually including an Accident Potential Zone (APZ), based in theory on its flight operations. The armed services then often lobby the local government with jurisdiction over that private property to restrict land use—by zoning or other means—in accordance with those low intensity uses which the DOD deems compatible with its air installation operations. The result is usually substantial downzoning and/or development plan changes which restrict use in the AICUZ to low intensity rural or agricultural uses.

So far, those federal courts which have heard AICUZ lawsuits brought by landowners have tended to side with the DOD, usually on the now-familiar basis that the federal government does not control the use of private land around its facilities, and only persuades—in its role as landowner—local government to change its land-use plans and regulations through lobbying like any other landowner.[29] In one of the most recent cases, the Air Force objected strenuously to the reclassification of property for purposes of development, and two pertinent local gov-

27. 42 U.S.C. § 4901 (1982).

28. *AICUZ Program Procedures and Guidelines for the Department of the Navy Air Installations*, OPNAVINST 11010.36 (May 25, 1979).

29. De-Tom Enterprises v. United States, 552 F.2d 337, 339 (Ct. Cl. 1977).

ernment bodies denied rezoning from agricultural to commercial use.[30] The court held that:

> No improprieties have been shown. The Air Force did strenuously object to the rezoning, and the two local bodies denied the applications. Without any improprieties—secret meetings, untrue representations or the like—high ranking air force officers repeatedly urged denial of the applications on the grounds of the noise levels of the overflights and the hazard of crashes from the flights in and out of the base. . . . In all of this, the Air Force was entirely within its rights as an affected landowner.[31]

In a different attack on the AICUZ process, major litigation has erupted in Hawaii over a recently promulgated AICUZ that covers much of the city and county of Honolulu's proposed secondary urban center, west of the present primary urban center—all of which has been so designated on the city and county's mandatory General Development Plan. In *F. E. Trotter, Inc. v. Watkins*,[32] the owners of the designated secondary urban center sued the Navy alleging not only a taking of property but also errors amounting to fraud in the collection and use of data in preparing and promulgating the AICUZ. The owners survived a motion to dismiss (May 1987) and continue to prepare for trial. It is worth noting that two of the findings of fact in the *Gilliland* case described how the Air Force found that some of the subject property was not subject to noise levels as high as those originally found in preparation of the AICUZ and that when the AICUZ was later amended, the property was removed.[33] This may be critical given the allegations in the *Trotter* case, amounting to a suggestion that without altering any of its operations, the Navy can and should change the AICUZ to avoid "blighting" the proposed secondary urban center. The AICUZ is particularly puzzling, as the installation for which it was promulgated—Barbers Point Naval Air Station—is a coastal facility and could presumably use the ocean for much of its overflight operations.

III. Physical Takings: Compensation Preserved, Public Purpose Lost

The Constitution has generally been interpreted to require that private property may not be physically taken by either the federal government or the state (or its local government subdivisions) except for a public purpose, and then, only upon payment of just compensation. This inter-

30. Gilliland v. United States, 228 Ct. Cl. 709 (1982).
31. *Id.* at 710.
32. Civ. No. 86-1093.
33. Slip Op. at 26.

pretation has been applied to the states in the same manner by virtue of the fourteenth amendment despite some ambiguity in the language of the fifth amendment. However, the Supreme Court has dealt with both these key aspects of property rights in the 1980s—to compensation and the public purpose shield against "compulsory purchase"—barely preserving the first and virtually destroying the second.[34]

Today, despite reservations by a minority of the Court, there is always a right to compensation for a physical taking, but the public purpose for the taking is whatever the legislative body says it is. Indeed, the right to compensation now appears to be all that remains of the fifth amendment as applied to physical takings.[35]

A. *The Preservation of Just Compensation*

The centuries-old separation of the common law of regulation and taking has always carried with it the key guarantee of compensation for the taking of private property by government, with the rare exception of an extreme public emergency.[36] It therefore came as a considerable surprise to many legal scholars that the blurring of the common law distinction between regulation and takings by Justice Holmes in *Pennsylvania Coal* in 1922 should culminate in the 1980s in an attempt to infect traditional standards of compensation for physical takings with the difficult and, in this instance, insidious practice of "balancing" those characteristics which represent a "regulatory taking."[37] After all, if the primary rationale for abandoning the "public purpose" test is, as the Supreme Court would apparently have it, that it is the only condition which the fifth amendment places upon the exercise of the power of eminent domain,[38] then any attempt to tinker with the principle of compensation for all physical takings would be chilling indeed.

34. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

35. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378 (1987).

36. F. BOSSELMAN, D. CALLIES & J. BANTA, supra, note 3; NICHOLS, THE LAW OF EMINENT DOMAIN (1917).

37. *See, e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987).

38. *First English*, 107 S. Ct. at 2385-86. *See also* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Callies, *A Requiem for Public Purpose*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN ch. 8 (1985).

1. PERMANENT PHYSICAL OCCUPATIONS ARE INVARIABLY TAKINGS

Fortunately, the Supreme Court in 1981 turned back an attempt to tinker with this principle in *Loretto v. Teleprompter Manhattan CATV Corp.*[39] The holding of the Court—that "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a 'taking'"—is not nearly so surprising as the fact that three dissenting justices proposed a contrary "balancing theory."

At issue in *Loretto* was the constitutionality of a New York ordinance, passed pursuant to a state statute, which forbade landlord interference with installation of CATV equipment upon "his property or premises."[40] While the statute originally granted limited rights to compensation for this invasion of property, a state commission further limited the amount to one dollar. The equipment amounted to a small box and some wires to be affixed to the outside of the building.

While agreeing that no formula existed for determining when the exercise of the police power through a land-use regulation resulted in a constitutionally protected taking, and that the Court had recently and frequently so held, the majority pointedly observed that:

> Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case "the character of the government action" not only is an important factor in resolving whether the action works a taking, but also is determinative.[41]

The Court further agreed that its "most recent cases have not addressed the precise issue before us" but "they have emphasized that physical invasion cases are special and have not repudiated the rule that any permanent physical occupation is a taking."[42] Noting that in *Penn Central Transportation Co. v. New York City*[43] it had clearly stated the need for a "balancing," the Court concluded nevertheless that "[t]he opinion does not repudiate the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine."[44]

As to the question of public benefit, the Court held that this was a proper element to be considered in dealing with the public purpose test in a regulatory context, discussed below, but *not* a factor to be consid-

39. 458 U.S. 419 (1982).
40. *Id.* at 423.
41. *Id.* at 426.
42. *Id.* at 432.
43. 438 U.S. 104 (1978).
44. *Id.*

ered in deciding whether there had been a physical taking of property:

> [w]hen the "character of the governmental action is a permanent physical occupation of property, our cases uniformly have found taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.[45]

In sum:

> We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property.[46]

In a remarkable disregard of established property rights principles, the dissent characterized as "curiously anachronistic" the majority's "per se takings rule" that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.

Emphasizing the relatively harmless nature of the physical invasion, the dissent would have preferred applying the "multifactor balancing test" formerly applied only to regulatory takings.[47] It may very well be that "the Court now reaches back in time for a per se rule that disrupts legislative determination" and that the decision does indeed represent an "archaic judicial response to a modern social problem."[48] But to turn the law of real property inside out to accommodate the "new and growing" CATV industry by infecting it with the balancing test used for regulatory takings would do grave damage both to the Constitution and to the rights in private property which the Bill of Rights was designed to protect. It is just such misguided "legislative determinations" against which the Bill of Rights was designed to provide a shield.

2. *LORETTO*'S PROGENY

The dissent in *Loretto* has not quite given up, however. In *FCC v. Florida Power Corp.*,[49] the Supreme Court held that a federal statute—the

45. 458 U.S. at 434-35. The court noted that:
The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude . . . temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his right to use, and exclude others from, his property.
Id. at 435 n.12.

46. *Id.* at 441.

47. *Id.* at 451.

48. *Id.* at 455-56.

49. 107 S. Ct. 1107 (1987).

Pole Attachments Act—regulating rates charged cable television firms by utility companies for attaching cables to utility poles was not a taking under the Court's "very narrow" holding in *Loretto*.[50] The Pole Attachments Act was designed to give the FCC authority to set such rents in the absence of state statutes, to avoid alleged anticompetitive and monopolistic charges by utility companies. However, in some instances the rents were reduced to a fraction of what the utility companies charged, raising the question of whether the utilities would have granted permission for such attachments at all at such low rents.[51] The plaintiff challenged the FCC's actions under the Act as a taking of property without compensation, citing *Loretto*. Inapplicable, held the Court, since:

> [T]he statute we considered in Loretto specifically REQUIRED landlords to permit permanent occupation of their property by cable companies, nothing in the Pole Attachments Act as interpreted by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators.[52]

The Court likened the case to a dispute over the economic relations between landlord and tenant, which it had steadfastly refused to characterize as takings, and reiterated that the "element of required acquiescense is at the heart of the concept of occupation"[53] which was the basis for the Court's holding in *Loretto*.

The Court's disclaimer notwithstanding, this crabbed interpretation of *Loretto* would be a considerable narrowing of that holding were it not for a footnote substantially restricting the applicability of *Florida Power*, in which the Court specifically reserved judgment on whether it would deny the FCC the power to require utilities "to enter into, renew, or refrain from terminating pole attachment agreements."[54] Presumably it would. Otherwise, permitting the FCC to slash rental rates while forcing utilities to continue with the rental agreement would amount to the same confiscation for which compensation was required in *Loretto*.

On the other hand, both federal and state courts have been quick to reaffirm traditional standards of taking and compensation for physical invasions since the *Loretto* decision. In *In Re Chicago, Milwaukee, St. Paul and Pacific Railway Co. v. United States*,[55] the court of appeals rejected the argument that because railroads were heavily regulated, they must bear an increased burden of diminution in the value of their

50. *Florida Power Corp.*, 107 S. Ct. at 1112 (citing *Loretto*, 458 U.S. at 441).
51. *Id.* at 1110–11.
52. *Id.* at 1112 (emphasis in original).
53. *Id.*
54. *Id.* at 1112 n.6.
55. 799 F.2d 317 (7th Cir. 1986).

property without compensation (while broadly finding no compensable taking for properties sold and transferred pursuant to railroad reorganization). Citing *Loretto*, the court observed that:

> If Congress condemned a railroad station to serve as a post office, this would be a taking notwithstanding the web of regulations surrounding the railroad, notwithstanding that Congress could have diminished the value of the entire railroad in some other way by an amount equal to the value of the station.[56]

Having the same effect is *Hall v. City of Santa Barbara*[57] in which the court of appeals remanded for trial physical takings issues raised by a city's rent control ordinance. In holding that plaintiffs appeared to raise substantial physical takings rather than regulatory takings issues, the court divided recent Supreme Court cases into regulatory takings versus physical takings categories and observed that "the Court reaches dramatically different results depending upon whether it concludes that a particular governmental action amounts to a physical occupation of property or merely a regulation."[58] It then observed that the loss of landlord's rights under the ordinance and the transferable rights thereby attained by tenants, could well be found to be a physical invasion at a trial on the merits.

In sum, a physical invasion, unless very temporary, is always a taking protected by the fifth amendment. This is fortunate because there is precious little left of the public purpose requirement for the exercise of eminent domain.

B. *A Requiem for Public Purpose:* Hawaii Housing Authority v. Midkiff[59]

In 1984, the Supreme Court unanimously upheld the constitutionality of Hawaii's Land Reform Act, emasculating the United States Constitution's fifth amendment "public purpose" requirement[60] for taking private property by eminent domain.[61] It did so by expanding on its previous language in *Berman v. Parker*[62] and by reinforcing *Berman*'s equating of eminent domain with government property regulatory activities under the police power.

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56. *Id.* at 325.
57. 797 F.2d 1493 (9th Cir. 1986).
58. *Id.* at 1498.
59. 467 U.S. 229 (1984).
60. "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V.
61. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
62. 348 U.S. 26 (1954).

1. *HAWAII HOUSING AUTHORITY V. MIDKIFF*

The Supreme Court chose Hawaii's Land Reform Act[63] as its vehicle for abolishing the public purpose requirement, which provides for the condemnation of a lessor's fee simple interest in residential housing lots to sell the same to the residential lessee residing on that lot, all for the legislatively declared purpose of alleviating a litany of social ills related to land oligopoly. The Supreme Court upheld the Land Reform Act on broad policy grounds—far beyond those necessary to decide the case.

Commencing with a review of Justice Douglas' opinion in *Berman v. Parker*,[64] the Court held that: "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[65]

In *Berman*, the Court had before it a challenge to the District of Columbia redevelopment law, the application of which resulted in the taking of plaintiff's perfectly viable commercial property and its ultimate conveyance to another private "person," all in furtherance of a redevelopment plan to eliminate blight. Although the case is vastly more famous for Justice Douglas' dictum concerning the use of the police power to achieve aesthetic goals, it also included his declaration that:

> [W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs. . . . *This principle admits of no exception merely because the power of eminent domain is involved.*[66]

Further, said Justice Douglas:

> Once the object is within the authority of Congress the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. . . . Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.[67]

Having thus established its point of departure, the *Midkiff* Court then reiterated:

63. HAW. REV. STAT. § 516 (1977).
64. 348 U.S. 26 (1954).
65. *Hawaii Hous. Auth.*, 467 U.S. at 241.
66. 348 U.S. 26, 32 (1954) (emphasis added).
67. *Id.* at 33.

> [D]eference to the legislature's "public use" determination is required "until it is shown to involve an impossibility." . . . In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "*unless the use be palpably without reasonable foundation.*"[68]

It was thereafter a foregone conclusion that "we have no trouble concluding that the Hawaii Act is constitutional."[69]

Indeed, it makes no difference even if the Act never achieves its purpose:

> Of course, this Act, like any other, may not be successful in achieving its intended goals. But "whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective."[70]

How was the Court persuaded to reach this decision on such a broad basis—unanimously? Much of the credit (or blame) clearly goes to the appellants who chose to characterize the Hawaii Act as not at all unusual, but simply a part of the normal progression commenced decades ago. Even if the Court chose to address the policy behind the taking, the state emphasized that such taking was unquestionably *compensated*, and that the adequacy of that compensation was not before the Court.[71] As "even regulations that are held to transfer private property interests in land so sharply as to be deemed 'takings' trigger at most a requirement of just compensation,"[72] where, the state asked essentially, was the rub?

That the Supreme Court bought the argument is evident from the most cursory reading of the transcript of proceedings before it.[73] Justice after Justice asked the Bishop Estate what was so unreasonable about the Hawaii legislature's public purpose declaration as to warrant judicial scrutiny, especially since just compensation was provided. Perhaps the most telling exchange occurred between the state and Justice Rehnquist:

> Justice Rehnquist: "I think the guts of the Fifth Amendment condemnation clause is to guarantee that where there has been a taking the owner will receive fair compensation, and that isn't even an issue here, that these owners are going to get fair compensation. You want us to go further and say that even where fair compensation is paid, the state can't condemn unless the courts agree with the legislature's assessment of public purpose, and I don't think any of our cases support that."
>
> *Bishop Estate*: "That is precisely our position."[74]

68. 467 U.S. 229, 240-41 (1984) (emphasis added).
69. *Id.* at 241.
70. *Id.* at 242 (citations omitted) (emphasis in original).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*

The aftermath of *Midkiff* has affected a variety of cases across the country.

2. *MIDKIFF'S* PROGENY: IS PUBLIC PURPOSE DEAD?

As a result of the narrow role *Midkiff* established for the courts in determining public purpose, a general trend of deference to Congress and state legislatures has emerged. In *Ruckelshaus v. Monsanto Company*,[75] the Supreme Court reiterated its *Midkiff* decision that "the scope of the 'public use' requirement of the Taking Clause is 'coterminous with the scope of the sovereign's police powers,'"[76] and that "[t]he role of the courts in second-guessing the legislature's judgment of what constitutes a public use is extremely narrow."[77] The Court followed its limited function: determining whether a "purpose is legitimate and whether Congress rationally could have believed that the provisions would promote that objective."[78] The Court, in *Ruckelshaus*, found that the provisions enacted by Congress under the Federal Insecticide, Fungicide, and Rodenticide Act served a procompetitive purpose that was well within the police power of Congress.[79] "So long as the taking has a conceivable public character, 'the means by which it will be attained is . . . for Congress to determine.'"[80]

In *Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corp.*,[81] the plaintiffs alleged "that the proposed taking of their building [was] neither for nor rationally related to a public purpose."[82] As the redevelopment project itself had such a purpose, the court found the plaintiffs' allegations "far too broad to address the limited concern of the court (and) clearly precluded by the settled law of *Berman* and *Midkiff* that 'absent evidence that a proposed taking treads on a specific consitutional right, we are concerned only that a taking is rationally related to some legitimate public purpose.'"[83]

Even if the "court were to conclude that [the] Project [was] a mammoth boondoggle, socially and architecturally ill-advised, it would still be a question for the political process, not a federal court."[84] Plaintiffs needed to demonstrate that no public purpose existed for the

75. 467 U.S. 986 (1984).
76. *Id.* at 1014.
77. *Id.*
78. *Id.* at 1015 n.18.
79. *Id.* at 1015.
80. *Id.* at 1014.
81. 605 F. Supp. 612 (S.D.N.Y. 1985).
82. *Id.* at 614.
83. *Id.* at 617.
84. *Id.*

Project. While the court stated that "federal courts remain available for challenges to truly private or truly irrational takings,"[85] it held that:

> Once a legitimate public purpose for the overall project is conceded . . . the court cannot get involved in parsing the particular degree of public or private motivation behind the inclusion of a particular site in the Project area, so long as that inclusion could rationally be related to the public purpose of the plan as a whole.[86]

For a while, there appeared yet to be some faint ray of hope. The Court of Appeals for the Ninth Circuit in a carefully worded and closely reasoned opinion, presented the Supreme Court with an opportunity to retreat a little from its sweeping *Midkiff* decision and apply a different and less deferential standard to legislative determinations of the public purpose in inverse condemnation proceedings. In *Hall v. City of Santa Barbara*,[87] the Court discussed the *Midkiff* decision but noted that "the Court . . . did not address the somewhat different articulation of the standard applicable in cases where there was no deliberate exercise of the eminent domain power."[88] Therefore, "The Midkiff Court left open the possibility that less deference would be afforded where government does not intend to effect a taking than where it does."[89]

Indeed, the court continued, "[e]ven under the deferential *Midkiff* standard, public use is not established as a matter of law whenever the legislature acts."[90] The court went on to observe that the *Midkiff* Court did say that there was a role for courts to play in reviewing a legislature's judgment of what constituted a public use, and "the test appears to be whether the legislature chose an objective that is within its authority under the police power, and whether it 'rationally could have believed that the [Act] would promote its objective.'"[91] Speculating once more that "[t]he test in inverse condemnation cases may well be more stringent," the court noted that:

> Here, the Santa Barbara City Council enacted the ordinance to alleviate what it perceived as a "critical shortage of low and moderate income housing." If appellants' allegations are substantiated, there would be significant doubt whether these purposes are achieved, or could rationally be thought achievable, by means of the ordinance.[92]

85. *Id.* at 619.
86. *Id.* at 618.
87. 797 F.2d 1493 (9th Cir. 1986).
88. *Id.* at 1502.
89. *Id.* at 1503.
90. *Id.*
91. *Id.*
92. *Id.*

3. YES, PUBLIC PURPOSE IS DEAD AFTER *FIRST ENGLISH*

However, even this faint ray may have been eclipsed by *dicta* in the Supreme Court's recent case, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[93] There, Chief Justice Rehnquist for the majority strongly suggested an interpretation of the fifth amendment which would virtually eliminate consideration of anything but the issue of just compensation in eminent domain cases of virtually every stripe:

> As its language [the fifth amendment] indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. *Sic transit* public purpose.[94]

IV. Regulatory Takings Redux and the Compensation Issue

Commencing with the Supreme Court's famous decision in *Pennsylvania Coal Co. v. Mahon*,[95] the federal courts have wrestled with the application of the Constitution's fifth (and fourteenth) amendment to regulations that adversely affect the use of land. Although state supreme courts slowly managed to distinguish away much of the decision's chilling effect upon land-use regulation and continue the regulation of land use approved by the Court in *Village of Euclid v. Ambler Realty Corp.*[96] during the fifty years when the Court heard no land-use cases of substance, the Court reentered the field with a vengeance on April Fool's Day, 1974, in *Village of Belle Terre v. Boraas*.[97] This case was to raise the protection of upper- middle-class suburban values to constitutionally protected status. In a series of cases[98] the Court then attempted to address and redress the issues and problems raised by Holmes' original holding that a regulation, if it goes too far, could amount to a constitutionally protected taking. What is "too far" and when is compensation

93. 107 S. Ct. 2378 (1987).
94. *Id.* at 2385-86.
95. 260 U.S. 393 (1922).
96. 277 U.S. 365 (1926). For cases so distinguishing, *see* F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 3.
97. 416 U.S. 1 (1974).
98. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. 255 (1980); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

an appropriate remedy, once the "too far" has been reached?

Until this year the Court had consistently avoided deciding either issue, erecting a formidable barrier of procedural and "ripeness" barriers to reaching the merits either of the taking issue or the compensation issue.[99] Early on, the Court decided that there was no "bright line" pointing the way toward a regulatory taking determination, and the process was entirely ad hoc.[100] The test of *Pennsylvania Coal*[101] was declared to be a "balancing test" weighing the public health, safety, and welfare goals served, on the one hand, against the degree of property value diminution, on the other. It is perhaps predictable that the Court would then beg off undertaking the balancing—let alone reach the compensation issue—until it could determine clearly what the degree of diminution was in each case. This has led the Court to turn back two of the last four regulation/taking cases on the ground that the landowner failed adequately either to take advantage of state inverse condemnation procedures, or to seek and be denied enough local land-use permits and permissions so as to permit an accurate assessment of how far local land-use regulations have devalued the subject property.[102]

In the 1987 Term there were three cases before the Court dealing with regulatory takings. The first, largely billed as a replay of *Pennsylvania Coal*, was recently decided as a *Euclid*-like frontal attack on a statute generally and not as applied.[103] The second, decided on exceedingly narrow grounds, finds compensation potentially available for temporary regulatory takings in which governmental regulation prevents *all* use of the land.[104] The third required an "essential nexus" between a condition attached to a land-use permit and the land-use need or problem a proposed use of land is expected to generate.[105]

The sections which follow summarize the current law on regulatory takings and suggest a consistent theory of regulation/taking. First, it is exceedingly difficult for a landowner to so much as properly and successfully *raise* the *taking* issue, let alone reach the *compensation* issue, in a case where a land-use regulation is challenged "as applied" be-

99. Agins v. City of Tiburon, 447 U.S. 255 (1980); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981).

100. Penn Central Transp. v. New York City, 438 U.S. 104 (1978).

101. 260 U.S. 393 (1922).

102. Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

103. Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987).

104. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378 (1987).

105. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987).

cause of the virtually insurmountable "ripeness" barrier. Second, based upon the two most recent Court decisions, it is also clear that so long as a land-use regulation leaves some value or use on the property as a whole and at the same time addresses proper police power regulatory objectives, it is going to be virtually impossible for a landowner to successfully challenge such a regulation. Third, dedications, exactions, and impact fees are permissible as exercises of local government police power, so long as there is a nexus between each of them and the need or problem they seek to address.

A. *Barriers to Suit: Ripeness*

In *Williamson County Regional Planning Commission v. Hamilton Bank*,[106] the Supreme Court held that a land developer alleging a regulatory taking and seeking compensation for the failure of a local government to approve its subdivision was precluded from doing so on ripeness grounds. This was so for two principal reasons. First, the property owner had failed to avail himself of the state's inverse condemnation remedy. Second, the property owner had failed to seek other land-use regulatory relief, partly through seeking use variances which would, if granted, have met a number of the concerns expressed by county authorities in refusing to grant the needed land development permissions. This latter requirement, held the Court, was particularly important since it was impossible to determine whether property values had been sufficiently reduced by the local regulatory regime so that, when balanced against the exercise of the police power, it could be adjudged to have gone "too far" until the local government had made a "final" decision.

Coupled with a dissent by Justice Stevens who sympathetically described the problems faced by local governments in trying to make decisions in the public interest on land-use matters, the coolness of the Court's language in the majority opinion—Holmes' famous language in *Pennsylvania Coal* referred to as a "notion" and the suggestion that maybe taking doesn't mean "literally" the fifth amendment—led some commentators to suggest that the Court might be willing to retreat from the Brennan dissent in *San Diego Gas & Electric Co. v. City of San Diego*,[107] if not from *Pennsylvania Coal* altogether.[108] Recall that the Brennan dissent in *San Diego*, virtually joined substantively by then-

106. 473 U.S. 172 (1986).
107. 450 U.S. 621 (1981).
108. Callies, *The Taking Issue Revisited*, 37 LAND USE LAW & ZONING DIG. No. 7, July 1985, at 6.

Associate Justice Rehnquist who sided with the majority on procedural grounds, reiterated that Holmes—and the Court—meant what was said about regulatory takings and set out a formula for awarding compensation under the fifth amendment—to the general discomfiture of state and local government officials as well as a host of commentators.[109]

What has followed since is a mixed bag. First, the ripeness barrier has made it increasingly difficult to reach regulatory takings issues in the lower courts. Although there has been increased litigation after the recently decided cases of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[110] and *Nollan v. California Coastal Commission*,[111] the litigation has concerned what compensation is payable *when and if* a regulation is held to be a taking, and whether exactions and impact fees are valid.[112] In *Golemis v. Kirby*,[113] in which the establishment of a twenty-five foot fire lane was challenged as a taking without compensation, the district court stated:

> There can be no serious question but that the rule of *Williamson County* applies full bore to the case at bar. So long as the state offers a suitable prospect for recourse in respect to the alleged "taking," a landowner must mine that quarry before panning for gold in the federal hills.[114]

In *Littleton v. Afton*,[115] involving a building permit dispute, the court of appeals held on the basis of *Williamson County* that "appellants claim for a taking is premature because the decision of the planning commission is not final because a variance has not been sought or denied."[116] In the "quick take" case *HMK Corporation v. County of Chesterfield*,[117] the district court quoted with approval *Williamson County* language requiring the seeking of variances before claiming a regulatory taking. In *Schafer v. City of Waupaca*,[118] plaintiff's fifth amendment claims for denial of a building permit were rejected on *Williamson County* grounds "until she has unsuccessfully attempted to obtain just compensation

109. For a review of the authorities and strong pleas on all sides, *see* Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984); Berger & Kanner, *Thoughts on the White River Junction Manifesto: A Reply To the Gang of Five's Views On Just Compensation for the Regulatory Taking of Property*, 19 LOYOLA L.A.L. REV. 685 (1986); Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment*, 15 RUTGERS L.J. 15 (1983).

110. 107 S. Ct. 2378 (1987).

111. 107 S. Ct. 3141 (1987).

112. *See infra* text accompanying notes 249-53 for full discussion.

113. 632 F. Supp. 159 (D.R.I. 1985).

114. *Id.* at 163-64.

115. 785 F.2d 596 (8th Cir. 1986).

116. *Id.* at 609.

117. 616 F. Supp. 667 (E.D. Va. 1985).

118. 637 F. Supp. 176 (E.D. Wis. 1986).

through the procedures provided by the State for obtaining such compensation."[119]

In *Robinson v. Ariyoshi*,[120] Hawaii's long-running water rights case was remanded yet again on *Williamson County* grounds in a terse, one-paragraph order.[121] In a building permit rescission case alleging takings under the fifth amendment, *Four Seasons Apartment v. City of Mayfield Heights*,[122] the court held the plaintiff's claim was not ripe because plaintiff had not used state inverse condemnation procedures, citing *Williamson County*.[123] In *Katsos v. Salt Lake City Corporation*,[124] taking issues under municipal zoning and noise ordinances were dismissed because, having failed to file a plan for development, "it is not conclusively apparent whether plaintiffs will be denied all reasonable beneficial use of their properties, so any claim the Ordinance *as applied* constitutes a taking is premature."[125] More recently, in *Lake Nacimiento Ranch Co. v. San Luis Obispo County*,[126] the Ninth Circuit held that county denial of an "informal development proposal" was not a "final and authoritative decision exposing the nature and extent of permissible development"[127] that is required under *Williamson County*. Contrary cases are few and far between.[128]

Second, it is clear from *Williamson County* and the more recent decision in *MacDonald, Sommer & Frates v. Yolo County*,[129] that the Supreme Court means what it says about ripeness AND is backpedalling from both *San Diego Gas & Electric* (in the dissenting opinion) and *Pennsylvania Coal*, as to what constitutes a regulatory taking. Although the majority (now including Justice Brennan who wrote the *San Diego* dissent) duly recites the *Holmes* doctrine regarding regulatory takings (a regulation that goes "too far" may be a taking), there is just enough of the "takings" analysis to permit the Court to reach the conclusion

119. *Id.* at 177.

120. 441 F. Supp. 559 (D. Haw. 1977), *appealed*, 753 F.2d 1468 (9th Cir. 1985), *modifying*, 106 S. Ct. 3269, *vacated*, 796 F.2d 339 (9th Cir. 1986).

121. To the apparent discomfiture of Hawaii's senior federal judge who wrote the original opinion, and who does not think highly of the application of the *Williamson* ripeness test to the water rights issues he decided in 1977. Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977), *aff'd*, 753 F.2d 1468 (9th Cir. 1985).

122. 775 F.2d 150 (6th Cir. 1985).

123. *Id.* at 151-52.

124. 634 F. Supp. 100 (D. Utah 1986).

125. *Id.* at 104-06 (citing Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)(emphasis in original)).

126. 830 F.2d 977 (9th Cir. 1987).

127. *Id.* at 980.

128. *E.g.*, Henley v. Herring, 779 F.2d 1553 (11th Cir. 1986); Furey v. Sacramento, 780 F.2d 1448 (9th Cir. 1986).

129. 106 S. Ct. 2561 (1986).

made foregone in *Williamson County*: since the appellant had not received a final local definitive position regarding how the county would apply its regulations to its property, there was a possibility that some development would be permitted. Therefore the claim for compensation was not ripe because the Court could not finally balance the extent of the "taking" (if any) by regulation.

Lastly, the Court's recent decision in *Keystone Bituminous Coal Association v. DeBenedictis*,[130] discussed more fully in Part IV-B below, makes clear the extent to which the Court is rethinking *Pennsylvania Coal*. The majority relegates its precedential value to regulatory taking situations in which property values have been reduced virtually to nothing or legitimate investment-backed expectations have been wholly frustrated by exercises of the police powers which are not properly based upon protecting public health, the environment, or local fiscal policy.

B. Keystone Bituminous Coal Association v. DeBenedictis: *When Does A Regulation Take Property?*

In reiterating the impossibility of setting clear standards for deciding regulatory taking cases, the Supreme Court in *Penn Central Transportation Co. v. New York City*[131] placed considerable emphasis on the legitimate investment-backed expectations of the property owner. Half a century before, the Court in *Village of Euclid v. Ambler Realty Co.*[132] had also emphasized the heavy burden upon a property owner when attacking the facial validity of a zoning ordinance, which it said it might find constitutionally defective in a given instance—and which it did promptly the following year in *Nectow v. City of Cambridge*.[133]

Whether the Court has simply applied a consistent and clearly signalled doctrine with respect to land-use cases, or whether it has gone back to these landmark decisions to bring order to what has recently become an increasingly chaotic area of constitutional law, the Court this year reexamined *Pennsylvania Coal v. Mahon*,[134] and harkened back to language in both *Euclid* and *Penn Central* to fashion—perhaps reemphasize?—the beginnings of a common law takings doctrine that appears to be sufficiently different so as to elicit strong objections from

130. 107 S. Ct. 1232 (1987).
131. 438 U.S. 104 (1978).
132. 272 U.S. 365 (1926).
133. 277 U.S. 183 (1928).
134. 260 U.S. 393 (1922).

four Justices in dissent. In the process, the majority revisited not only *Agins v. City of Tiburon*[135] and *Andrus v. Allard*,[136] together with the theories which moved lower courts in *Deltona Corporation v. United States*,[137] but also *Hadacheck v. Sebastian*,[138] and *Mugler v. Kansas*,[139] which predated *Pennsylvania Coal*, and *Miller v. Schoene*,[140] which was next.

The Court reviewed its decision in *Pennsylvania Coal* so as to indicate why the balancing test, while appropriate in some instances, was not appropriate in analyzing a facial challenge. The facts of the case, especially as compared to those in *Pennsylvania Coal*, were crucial to its holding.

Since 1966, Pennsylvania's Subsidence Act[141] had prohibited any mining causing subsidence damage to public buildings, dwellings used for human habitation, and cemeteries. The state Department of Environmental Resources required 50 percent of the coal beneath such protected structures to be kept in place in order to provide that support. Keystone Bituminous Coal Association alleged that the Act had taken their (private) property without compensation in violation of the fifth and fourteenth amendments.

The *Keystone* Court distinguished *Pennsylvania Coal*. In the first place, Holmes was dealing with a statute—the Kohler Act—designed to protect private property and "[t]his case is the case of a single private home."[142] The damage complained of there was "not common or public."[143]

It was thus not a bona fide exercise of the police power.[144] The Court noted that Holmes had launched "uncharacteristically" into an "advisory opinion" that discussed the general validity of the Act, which had NOT been before the Court.[145] First, as it served private interests, the Kohler Act could not be sustained as an exercise of the police power. Second, the statute made it commercially impracticable to mine certain coal in the areas affected by the Kohler Act. But here, said the Court, the Subsidence Act was directed at what the state perceived to be a signifi-

135. 447 U.S. 255 (1980).
136. 444 U.S. 51 (1979).
137. 657 F.2d 1184 (Ct. Cl. 1981).
138. 239 U.S. 394 (1915)
139. 123 U.S. 623 (1887).
140. 276 U.S. 272 (1928).
141. PA. STAT. ANN. tit. 52, § 1406.4 (Purdon Supp. 1986).
142. 260 U.S. at 413.
143. *Id.* at 413-14.
144. *Id.* at 414.
145. *Keystone*, 107 S. Ct. at 1241.

cant threat to common welfare, not the protection of a single private house. Moreover, there was nothing in the record of the case to indicate that the Association could not profitably engage in business or that there would be undue interference with investment-backed expectations.[146]

1. PUBLIC PURPOSE

The Subsidence Act was not a "private benefit" law like the Kohler Act, according to the Court. In acting to protect the public interest in health, the environment, and the fiscal integrity of the area, the state was exercising its police power to abate activity akin to a nuisance. The Court then cited *Mugler v. Kansas*,[147] *Plymouth Coal Co. v. Pennsylvania*,[148] and *Miller v. Schoene*,[149] as proof that the Supreme Court had repeatedly upheld regulations that destroyed or adversely affected real property interests, provided that the state's interest in the regulation was, as here, strong enough. In a footnote, the Court contrasted these with the physical invasion cases such as *United States v. Causby*,[150] and *Loretto v. Teleprompter Manhattan CATV Corp.*,[151] discussed previously, in which the Court had almost invariably found a taking to have occurred.[152] Therefore, held the Court, rather than overruling *Mugler*, as plaintiff had suggested, it noted that, if anything *Pennsylvania Coal* was consistent with them!

2. DIMINUTION OF VALUE AND INVESTMENT-BACKED EXPECTATIONS

Moreover, and probably more critical, the Court characterized plaintiff's showing of deprivation of property rights as not sufficiently significant to satisfy the "heavy burden placed upon one alleging a regulatory taking."[153] The Court's holding here was based on several critical factors.

a. "Mere Enactment" vs. "Specific Impact"—Facial vs. As Applied. Noting that it had recently rejected on several occasions takings claims based upon "mere enactment of a statute,"[154] the Court quoted with approval language which stated that, as it had said repeatedly, it could only decide takings cases based on ad hoc factual inquiries, with

146. *Id.* at 1242.
147. 123 U.S. 623 (1887).
148. 232 U.S. 531 (1914).
149. 276 U.S. 272 (1928).
150. 328 U.S. 256 (1960).
151. 458 U.S. 419 (1982).
152. *Keystone*, 107 S. Ct. at 1244 n.18.
153. *Id.* at 1246.
154. Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

reference to particular properties. Shades of *Euclid* were brought to mind—zoning is constitutional in principle despite a constitutional challenge—and *Nectow*— but it may well be unconstitutional as applied in a particular instance.

b. Extent of Diminution. Plaintiffs claimed that the Subsidence Act had forced them to leave 27 million tons of coal in place as support. Because they owned it but could not mine it, they claimed this resulted in an unconstitutional taking of private property. The Court rejected the claim on three grounds. First, the coal in place did not represent a separate segment of property for takings law purposes. The Court refused to concentrate on these separate pillars of coal as distinct property rights, observing that it had consistently held that when an owner has a full bundle of rights, the destruction of one strand would not be a taking. The bundle must be viewed in its entirety.[155] To the same effect was *Penn Central*,[156] where the Court observed that takings jurisprudence does not divide a single parcel into discrete segments and does not attempt to determine whether rights in a particular segment have been entirely abrogated.

The Court distinguished Holmes' "certain coal" as being commercially impractical language in *Pennsylvania Coal* referring to whether the coal could be extracted profitably, not whether it could be extracted at all.[157] Moreover, observed the Court, the record indicated that only 75 percent of plaintiff's underground coal could be profitably mined anyway, and there was no showing that their reasonable investment-backed expectations had been materially affected by the additional duty to retain the small percentage required to support the structures protected by the Act.

Second, even though Pennsylvania law apparently regarded the support estate as a separate interest in land (and if so construed, the effect of the Pennsylvania regulation on property rights certainly appears to be greater) the Court was not bound by such construction: "It is clear, however, that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights."[158] In any event, the support estate only would have value if viewed in conjunction with the rest of the estate. There was no indication that plaintiff could not mine profitably even if they could not destroy or damage surface structures.

155. Andrus v. Allard, 444 U.S. 51 (1979).
156. 438 U.S. at 130–31.
157. *Keystone*, 107 S. Ct. at 1249.
158. *Id.* at 1250 (citing *Allard* and *Penn Central*).

Lastly, even accepting plaintiff's theory that the support estate should be viewed separately, the Court rejected their taking claim. This was because plaintiff did not show what percentage of the support estate had been affected by the Act, and plaintiffs had far more support estate than they were required to leave in place under the Subsidence Act.[159]

In a vigorous dissent written by Chief Justice Rehnquist, four of the nine Justices challenged the majority's recharacterization of *Pennsylvania Coal* and the economic effect of the Subsidence Act on plaintiff's business. The Kohler Act indeed was passed to correct "public" evils and abuses, and therefore it was similar to the Subsidence Act, leaving *Pennsylvania Coal* as the guiding precedent for deciding this case.[160] As to the question of whether a taking had occurred, the dissent strongly objected to the heavier burden placed upon plaintiffs challenging a nuisance-preventing harm to the public, and questioned whether in any event this case would fit in such a category. Moreover, when dealing with regulatory takings, contrary to the majority's view, the full bundle of property rights need not be taken—just a few sticks. In any event, the Court had in the past dealt with such takings by defining property in accordance with state law, and given the Pennsylvania definition of a separate support estate, should do so again here and find that a taking by regulation had occurred.[161] This was odd language from a Justice who had so carefully observed in *Kaiser Aetna v. United States*[162] that state law in the area of real property would have to bend to the Constitution—and not the other way around.[163]

3. RECENT DECISIONS: THE BARRIER OF ALL ECONOMIC USE

Notwithstanding the foregoing, the "new" standard appears to be this: in order to successfully challenge a land-use regulation as a regulatory taking, a plaintiff must show: (1) it is not merely difficult, but impossible to make a profit on the land as restricted; and (2) the regulation does not serve a legitimate, general, and substantial public interest in the health, environment, and fiscal integrity of the area.

Recent cases citing *Keystone* confirm this analysis. While often cited merely for what that decision adds to the law of subsidence,[164] a number

159. *Id.* at 1251.
160. *Id.* at 1254–55.
161. *Id.* at 1260–61.
162. 444 U.S. 164 (1979).
163. *Id.*
164. *E.g.*, Citizens Organized Against Longwalling v. Division of Reclamation, No. 380 (Ohio Ct. App., Aug. 25, 1987) (LEXIS, States library, Omni file); Peters Township School Dist. v. Hartford Accident & Indem. Co., 833 F.2d 32 (3d Cir. 1987).

of other courts are interpreting the takings standard set in *Keystone* to be all economic use of the property taken as a whole. Perhaps the most ringing affirmation of the "new" regulatory taking doctrine comes from the Third Circuit in *Empire Kosher Poultry, Inc. v. Hallowell*,[165] in which some poultry processors had alleged that a quarantine imposed to prevent the spread of avian influenza amounted to a taking of property without just compensation. In rejecting the allegation and affirming the validity of the regulation, the court held that "*Keystone Bituminous* makes clear that to prevail on a regulatory taking claim, a claimant must establish both that the governmental action falls outside the traditional police power, and that the governmental action sufficiently interferes with investment-backed expectations."[166]

A more thorough and detailed analysis of "takings" law, particularly the threshold issues which need first to be addressed, comes from the Washington Supreme Court in *Orion Corp. v. Washington*.[167] There, a development corporation alleged a taking of its substantial coastal landholdings by the state through the application of a state coastal zone plan and the establishment of a nature reserve. After recounting at length Washington's extensive takings jurisprudence and noting its alliance with those jurisdictions making a clear distinction between fifth amendment takings and fourteenth amendment due process claims, the court interpreted *Keystone* and *First English*, discussed in Part C below, to "insulate" the state from any and all takings claims under certain circumstances:

> As we read the *Keystone Coal Ass'n* opinion, exercises of the police power cannot be characterized as a compensable taking whenever the state imposes land-use restrictions in order to safeguard the "public interest in health, the environment, and the fiscal integrity of the area." . . . This insulation from the takings analysis continues even if the regulation denies a landowner all economically viable use of the property. . . . We assume, however, that because the police power has its limits, even insulated regulations must withstand the due process test of reasonableness.[168]

At several points in its lengthy opinion the court expressed some frustra-

165. 816 F.2d 907 (3d Cir. 1987).

166. *Id.* at 915.

167. 109 Wash. 2d 621, 747 P.2d 1062 (1987). *See infra* notes 216, 232, and accompanying text.

168. *Id.* at 621, 747 P.2d at 1080. The rest of the opinion, though extremely long, bears reading thoroughly as an indication of how courts might usefully deal with the assessment of damages in complex "takings" structures. Useful as it is, the dissent is probably accurate in observing the case was not "ripe" for review under any reasonable application of Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). The developer had apparently never sought a "substantial" development permit or variance, so that the government agencies involved had no real opportunity to grant or deny development permits.

tions with the Supreme Court's failure to substantively cite *Keystone* in its later *Nollan* and *First English* opinions, despite some dicta on takings in both cases; thereby, in the court's view, continuing to muddy the waters concerning the taking issue threshold.[169]

The Supreme Court of North Dakota emphasized the *Keystone* requirement that all of a landowner's property interests must be examined in deciding whether a regulatory taking has occurred. In *Grand Forks-Trail Water Users, Inc. v. Hjelle*,[170] the court held that land-use restriction statutes bearing upon underground water lines were not a taking by regulation because under *Keystone*, "[i]n determining whether a restriction constitutes a taking, courts look to the effect of the restriction on the parcel as a whole, rather than to the effect on individual interests in the land."[171] Here, "the statutes do not prohibit all or substantially all reasonable uses of the regulated property as a whole."[172] To the same effect, concluding that a regulatory taking of mineral rights had occurred, is *Western Energy Co. v. Genie Land Co.*,[173] where the court noted the issue was the "destruction of Western's entire bundle of rights. . . ."[174]

The extent of the use of land which a regulation must "take" before a court will characterize it as a "regulatory taking" is addressed in the First Circuit decision in *United States v. Rivera Torres*.[175] There, a landowner in Puerto Rico alleged such a regulatory taking when prohibited from developing wetlands under the Clean Water Act. Citing *Keystone*, the court quoted an earlier Supreme Court decision[176] with approval:

> Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.[177]

A diametrically different interpretation is suggested in the Ninth Circuit, however, in Herrington v. County of Sonoma, 834 F.2d 1488 (9th Cir. 1987). Dealing with constitutional claims arising out of the denial of property owners' subdivision application, the court of appeals cites *Nollan* for the proposition that "even if the government's action is a legitimate exercise of the police power, it is not insulated from a taking challenge," 834 F.2d at 1496. Once again, coherent analysis among decisions following the Supreme Court's recent opinions in *Keystone*, *First English*, and *Nollan* is challenging since the latter two barely cite the former, while containing dicta on the same taking issues.

169. *Herrington*, 834 F.2d at 1499.
170. 413 N.W.2d 344 (N.D. 1987).
171. *Id.* at 346.
172. *Id.* at 347.
173. 737 P.2d 478 (Mont. 1987).
174. *Id.* at 483.
175. 826 F.2d 151 (1st Cir. 1987).
176. United States v. Riverside Bayview Homes, 474 U.S. 121 (1985).
177. *Riverside*, 474 U.S. at 121.

To the same effect is the Ninth Circuit decision in *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*,[178] where the court reiterated the test to successfully challenge a county zoning restriction as a taking of property: whether "it denies an owner economically viable use of his land."[179]

C. First English: *Compensation For Taking of All—or All Economic—Use*

Once over the "ripeness" and "taking" hurdles, what about the "compensation" issue? After exhausting all avenues for land use permitting and demonstrating that the property has no economic use, can a landowner claim compensation for a "regulatory taking"?

In *First English Evangelical Lutheran Church of Glendale v. Los Angeles*,[180] an again divided Court decided yes, in certain circumstances. The church sued the county for passing an interim ordinance prohibiting most development on its property. Rains had caused flooding which destroyed the church's summer camp, following which the county had temporarily designated the property, located along a creek, as a flood protection area. The California courts held that the remedies available to a plaintiff alleging deprivation of use of land by ordinance were declaratory relief or mandamus. The church sought only damages.

In reversing, the Supreme Court for the first time held that compensation may be an appropriate remedy for the regulatory taking of *all* of a landowner's property, "We merely hold that where the government's activities have already worked a taking of all property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[181]

1. A CRITICAL ASSUMPTION: ALL USE "TAKEN"

But that is all the Court held. The Court did not grant compensation to the church. The Court sent the case back to California simply because it interpreted the California courts to have forbidden money damages for government regulations that denied an owner *all* use of its property. The Court did not say that floodplain controls—or any other land-use controls—take property. It specifically refused to so hold: "We [accordingly] have no occasion to decide whether the ordinance at issue

178. 830 F.2d 977 (9th Cir. 1987).
179. *Id.* at 981.
180. 107 S. Ct. 2378 (1987).
181. 107 S. Ct. at 2389 (emphasis added).

actually denied appellant all use of its property. . . .''[182] Therefore, this decision is no precedent for deciding what is, or is not, a regulatory taking of property; that was decided in the *Keystone* case, discussed earlier. In *First English*, the Court said only if an ordinance temporarily denies all use to a landowner—that is, assuming the difficult ripeness and balancing barriers to proving a regulatory taking have been surmounted—a state court may not forbid compensation as a remedy.

2. A CRITICAL ASSUMPTION: BEYOND GOVERNMENT AUTHORITY TO ENACT SAFETY REGULATIONS

The Court did not say that, *if* floodplain controls do take property, the owner is entitled to money damages, apparently even if that prevents all private use of land: ''We have no occasion to decide . . . whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as part of the state's authority to enact safety regulations.''[183] Therefore, even the most grievous effects on private property values may be justifiable if the public need for the regulation is sufficiently dire.[184] The *First English* decision is therefore limited to the very narrow situation where government has lost a ''regulatory taking'' case.

The dissent (three Justices) points out that the Court probably should never have reached the compensation issue at all, having possibly misread the California rule on compensation for regulatory takings. Nevertheless, the Court held that ''[t]hese questions, of course, remain open for decision on the remand [which] we direct today.''[185] If this means that Los Angeles County can avoid paying money altogether by showing either that the church retains some use of its property, or that the regulation is necessary as a safety regulation, then it is not at all clear why the Court could not wait to have these questions determined before deciding the ''compensation'' question. The Court has four times previously refused to reach the ''compensation'' question, and on more facts and fewer assumptions than it was willing to make here.[186]

Now that state courts may not absolutely forbid compensation as a

182. 107 S. Ct. at 2384.
183. *Id.* at 2384-85.
184. Indeed, the Court so held in *Keystone Bituminous Coal Ass'n v. DeBenedictis*. *Id.*
185. *Id.* at 2385 (emphasis added).
186. Agins v. City of Tiburon, 447 U.S. 255 (1980); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

remedy for temporary regulatory deprivation of all private land use, it would appear that:

1. If, for example, a state or a county should zone land "park" and forbid all (not substantially all, nor all economic, but ALL) land use, then IF (as is likely) a court should find that the state or county regulation results in a constitutionally protected taking, money damages are available for the period from the application of the regulation to the property to the date of the court decision. The finding of a regulatory taking is likely because, under the *Keystone* case discussed previously, the Court sets great store by the health, environmental, and safety need for the regulation and the extent of the economic use left, which, presumably, would be none in the case of a park.
2. Virtually all other land-use ordinances, plans, and permit decisions are left intact by the *First English* decision, as the Court makes clear, "We limit our holding to the facts presented and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, change in zoning ordinances, variances, and the like which are not before us."[187]

3. RECENT DECISIONS: NO EFFECT ON "TAKING" ISSUE AND NOT MUCH COMPENSATION

Is the decision an aberration, or a harbinger of things to come? The few cases decided since *First English* give no clear picture, but on balance, the trend appears to be a restrictive interpretation, harkening back to *Keystone*, and a strict standard for first finding a regulatory taking. In *Grand Forks-Trail Water Users, Inc. v. Hjelle*,[188] the Supreme Court of North Dakota reversed an award of compensation to plaintiffs for the relocation of a water line. Noting that the premises as a whole retained substantial value, the Court first reiterated the *Keystone* standard concerning divisible property rights:

> In determining whether a restriction constitutes a taking, courts look to the effect of the restriction on the parcel of land as a whole, rather than to the effect on individual interests in the land.[189] . . . In our view, prohibiting a landowner, and thus his lessee

187. *First English*, 107 S. Ct. at 2389 ("Here we must assume that the Los Angeles County ordinances have denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy.").

188. 413 N.W.2d 344 (N.D. 1987).

189. *Id.* at 346 (citing *Keystone*, 107 S. Ct. at 1248).

> or grantee, from constructing "any electrical supply or communication line, gas, oil or water or other pipeline" within 100 feet of the center line of a state highway without the Commissioner's consent . . . do[es] not prohibit all or substantially all reasonable use of the regulated property as a whole.[190]

Continuing, the Court expressly distinguished *First English*: "In First English, the complaint alleged 'that the ordinance in question denied appellant all use of its property.'[191] The statutes involved in this case do not deny all use or substantially all use of the property as a whole."[192]

The extent to which courts will react to egregious instances of takings by regulation, even if temporary in nature, is clearly illustrated by *Wheeler v. City of Pleasant Grove*.[193] There, the local government "outlawed" construction of apartment complexes after a referendum opposing them, and after granting landowners a building permit (upon which they relied to their detriment) for their fully-complying proposed complex. Citing *First English*, the court found the landowner's compensable interest as follows, even though the property was worth more after the lifting of the restriction than before:

> In the case of a temporary regulatory taking, the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit. . . . The landowner's compensable interest, therefore, is the return on the portion of the fair market value that is lost as a result of the regulatory restriction. Accordingly, the landowner should be awarded the market rate return computed over the period of the temporary taking on the difference between the property's fair market value with the restriction. . . . Under this approach, the landowner recovers what he lost. To award any affected party additional compensation for lost profits or increased costs of development would be to award double recovery; the relevant fair market values by definition reflect a market estimation of future profits and development cost with respect to the particular property at issue.[194]

Indeed, one circuit court of appeals, citing *First English*, has suggested that if it so happens that temporary damages exceed permanent damages, the higher award may be justified. In *Yuba Natural Resources, Inc. v. United States*,[195] the federal government erroneously claimed certain mineral rights during the period when gold was valued far higher than either before or after the period of claim. The court held that the temporary period was the one for measuring damages, even though the award would be far less if permanent damages were awarded.

190. *Id.* at 346–47 (citing *Keystone*, 107 S. Ct. at 1248).
191. *Id.* at 348 (quoting *First English*, 107 S. Ct. at 2389).
192. *Id.* For a similar view in a condominium conversion ordinance dispute (held unconstitutional); *see* Seawall Ass'n v. City of New York, 523 N.Y.S.2d 355 (1987).
193. 833 F.2d 267 (11th Cir. 1987).
194. *Id.* at 271.
195. 821 F.2d 638 (Fed. Cir. 1987).

However, it is also true that even after *First English*, courts are making it clear of the need to show first no alternative economic use remains of the property despite the offending regulation. Thus, in the condominium conversion case of *Hornstein v. Barry*,[196] the court observed, citing *First English*, that:

> [A] showing that a legislative restriction on land use (e.g., rent control, preservation of historic landmarks, etc.) will diminish the market value of a given piece of real estate is not sufficient to establish an illegal taking, if alternate uses survive which provide an aggrieved owner a reasonable financial return.[197]

Moving to the issue of whether all economic use or "all use" is the proper standard for deciding whether a regulation works a constitutionally protected taking, the Ninth Circuit has held that the standard is *all* economic use after *First English*. In *Citizen's Association of Portland v. International Raceways*,[198] the court emphasized that:

> Whether an unconstitutional taking of property without compensation has occurred depends upon whether the owner has been deprived of economically viable use of the property. . . . Mere reduction of property value is insufficient to establish a taking. . . . The recent Supreme Court decisions in [*First English* and *Nollan*] are not to the contrary. Both of those cases involved land use regulations so extensive they constituted a taking.[199]

Further, in *Herrington v. County of Sonoma*,[200] the Ninth Circuit agreed with the trial court that landowners had suffered a regulatory taking when the county denied their subdivision application in order to preserve the land for agricultural use in accordance with a county plan. The court interpreted *First English* as requiring that, "In order to succeed with a regulatory taking claim, a property owner must demonstrate that all or substantially all economically viable use of the property has been denied."[201]

As in the *Orion* case (discussed earlier, Part B, and below) the court also distinguished between due process and "without compensation" takings, suggesting that while the latter requires proof of virtually all value taken, the former "does not require proof that all use of their property has been denied," but that the burden to show that the land-use restriction is arbitrary or irrational is correspondingly extraordinarily heavy and, as a result, the damage award may be lower.[202] Finding that

196. 530 A.2d 1177 (D.C. 1987).
197. *Id.* at 1185.
198. 833 F.2d 760 (9th Cir. 1987).
199. *Id.* at 762.
200. 834 F.2d 1488 (9th Cir. 1987).
201. *Id.* at 1497.
202. *Id.* at 1498.

the landowners' due process claims were thus ripe, the court nevertheless found that, because they were left with their property, there had been no permanent taking and that the damage award—based on such a permanent and total taking—was "grossly excessive."[203]

At least one federal district court has cited with approval that part of *First English* which supported the idea that the ordinance in question denied plaintiff all use of its property. In *Campbell v. Sales Tax District #3 of St. Tammany Parish*,[204] the court then pointedly observed that there was "no similar allegation in [this] case."[205]

However, the better view is probably that suggested by the Oregon Court of Appeals in *Dunn v. City of Redmond*.[206] Citing *First English*, the court noted that "*First English Evangelical* states no new standards about when governmental regulations give rise to takings subject to federal constitutional redress."[207]

In *Atlanta Board of Zoning Adjustment v. Midtown North, Ltd.*,[208] the Supreme Court of Georgia denied compensation for loss of access rights for a commercial parking lot. In response to takings claims based on the *First English* decision, as well as *Nollan*, discussed in the section below, the court first set out the rule in Georgia, "A limitation on a landowner's use of his property [through zoning] does not rise to the level of a constitutional deprivation when that limitation is the result of the proper exercise of the police power. If the ordinance is valid, then its enforcement could not constitute a taking."[209]

In a footnote to that portion of the opinion, the court made it crystal clear it did not see how either the *First English* or the *Nollan* decisions would change that rule:

> Midtown cites two recent United States Supreme Court decisions concerning land use regulations. *First English* . . . provides for an immediate remedy for a total taking of property. *Nollan* . . . holds that conditional zoning will not be upheld unless there is a sufficient connection between the conditional zoning and a valid land use regulation. . . . Neither case addresses controlling issues of this case.[210]

On the other hand, the Washington Court of Appeals chose to read *First English* and *Keystone* very broadly—indeed erroneously—in reversing the denial of a plat approval for failure to provide sufficient access, and

203. *Id.* at 1563.
204. 673 F. Supp. 790 (E.D. La. 1987).
205. *Id.* at 794.
206. 86 Or. App. at 267 n.1, 739 P.2d 55 n.1.
207. *Id.*
208. 257 Ga. 496, 360 S.E.2d 569 (1987).
209. *Id.* at 497, 360 S.E.2d at 570-71.
210. *Id.* at 497 n.2, 360 S.E.2d at 570 n.2.

for violating a minimum five-acre density requirement.[211] In *Augustson v. King County*,[212] the court ordered the county to approve a "short plat" without the above conditions and remanded for additional proceedings on the issue of damages. In noting that *Keystone* and *First English* "would appear to lend credence to respondent's position,"[213] the court misstated the *Keystone* test and left out the critical "all" in front of value in stating the *First English* test.[214]

This opinion is difficult to square with the Washington Supreme Court's opinion in *Orion Corp. v. Washington*,[215] discussed earlier in Part B. There, the court noted that a police power regulation would, under *First English*, be insulated from a taking/compensation claim altogether if it were passed pursuant to a state's authority to enact health and safety regulations. The court then cited a number of instances in which the Supreme Court arguably had demonstrated what it meant by such insulated safety regulations.[216]

Finding that the creation of the marine sanctuary on plaintiff's land by the State of Washington was not so insulated, the court remanded for evidence on whether aquaculture was a viable use of plaintiffs' property. If so, then the creation of the marine reserve would proximately cause the denial of all reasonable use and plaintiff had a good compensation claim. Otherwise, the other "profitable" uses were denied by enforcement of the state's coastal zone management plans which were arguably so insulated, and regardless of the extent of taking, plaintiff would have no cause of action.[217]

Finally, a California appellate court addressed the inapplicability of a compensation remedy for normal delays in the zoning process. In *Guinnane v. City and County of San Francisco*,[218] the court of appeal held that delaying the granting of a building permit pending environmental review did not constitute unreasonable delay, given plaintiff's delay in submitting documents deemed necessary for the review, "[T]here is nothing in *First English* which alters the established principle that the

211. Augustson v. King County, 49 Wash. App. 409, 743 P.2d 282 (1987).
212. *Id.*
213. *Id.* at 412 n.2, 743 P.2d at 285 n.2 (holding that an action for an unconditional taking may lie where there is a showing that land-use regulations result in diminution of value and loss of investment-backed expections or both).
214. *Id.* (holding that even a temporary denial of a landowner's use of his land may be compensable).
215. 109 Wash. 2d 621, 747 P.2d 1062 (1987). *See supra* note 183 and *infra* note 216 and accompanying text.
216. 109 Wash. 2d 621 n.23, 747 P.2d 1062 n.23.
217. *Id.* at 643, 747 P.2d at 1084.
218. 197 Cal. App. 3d 862, 241 Cal. Rptr. 787 (1987).

interim burden imposed on a landowner during the government's decision-making process, absent unreasonable delay, does not constitute a taking.[219]

One thing is more certain: the "decision today will generate a great deal of litigation."[220] Courts still uphold the *proper* exercise of the police power (local land-use controls never were a "no-lose" proposition for government) and are not prepared to open the public treasury for every—or even most—land-use regulation that reduces the value of private property.

D. Nollan v. California Coastal Commission: *Fees, Exactions, the Rise of "Nexus," and the Demise of "Reasonable Relationship"*

The Supreme Court appears to have given its collective blessing to impact fees, dedications, exactions, and other conditions on land development in *Nollan v. California Coastal Commission*.[221] The decision goes a long way towards settling a growing national debate over the proper standards for such conditions.[222] It does not affect at all the Court's clear rejection of compensation for well-founded land-use regulations in *Keystone Bituminous Coal*. It has nothing whatsoever to do with *First English*.

1. THE IMPACT FEE

One of the most innovative and potentially burdensome (for landowners) mechanisms for the funding of public facilities made necessary by growth is the impact fee. Typically, an impact fee is levied upon a development to pay for public facilities the need for which is generated, at least in part, by that development.[223] Impact fees are superior to in-lieu fees, dedications, and assessments for the following reasons:

1. Impact fees can be used to fund types of capital facilities not usually subject to dedication requirements and fees in lieu thereof;
2. Since they are not tied to dedication requirements, impact fees can more easily be

219. *Id.* at 865, 241 Cal. Rptr. at 790.

220. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2389-90 (1987) (Stevens, J., dissenting).

221. 107 S.Ct. 3141 (1987).

222. *See* BOSSELMAN & STROUD, LEGAL ASPECTS OF DEVELOPMENT EXACTION ch. 4 (1988); Berger, *The Year of the Taking Issue*, 1 B.Y.U. J. OF PUB. LAW 261, 315330 (1987). *See generally Exactions: A Controversial New Source for Municipal Funds*, 50 LAW AND CONTEMP. PROBS. 51 (1987); DEVELOPMENT EXACTIONS (Frank & Rhodes eds. 1987).

223. Juergensmeyer, *Funding Infrastructure Paying the Costs of Growth Through Impact Fees and Other Land Regulation Charges*, (Lincoln Institute/Land Policy Monograph No. 855 1985).

applied to public facilities, the need for which is generated by, but located outside of, the development;

3. Impact fees can be applied to condominiums, apartments, and commercial developments which create the need for extradevelopment capital expenditures, but which often escape dedication or in-lieu fee requirements found in subdivision ordinances which typically apply only to single family detached residential development;
4. Impact fees can be collected at various stages, such as when building permits are issued, or at other times when growth creating a need for new services occurs, rather than at the time of platting.

In assessing the validity of impact fees, state courts first inquire into whether enabling legislation authorizes the municipality to impose the fee. If there is sufficient authority to impose a fee, courts then address the relationship between the development upon which the fee was levied and the amount and use planned for the fee. Generally, state courts have used three approaches in determining the reasonableness of this relationship: (1) the "rational nexus" test, as applied by the Florida courts and a growing majority of other jurisdictions; (2) the more restrictive "specifically and uniquely attributable" test, as formerly applied in Illinois and Rhode Island; and (3) the less restrictive—indeed generous—"reasonable relationship" test, applied by the California courts.[224] *Nollan* appears to reject the last and embrace the first. That is probably a good thing.

a. The Rational Nexus Test. The rational nexus test is the most widely used standard for examining development exactions, especially the impact fee. First proposed by Heyman and Gilhool in 1964,[225] the test was quickly picked up by courts in both New York and Wisconsin in landmark dedication and exaction cases.[226] Some commentators claim it became the "national standard" by the end of the 1970s.[227] The test has two-parts. First, the particular development must create a "need," to which the amount of the exaction bears some roughly proportional relationship. Second, the local government must demonstrate that the fees levied will actually be used for the purpose collected, by proper "earmarking" and timely expenditure of the funds.[228]

224. Smith, *A Brief History of Land Development Exactions*, 50 LAW AND CONTEMP. PROBS. 5 (1987).

225. Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J.1119 (1964); *see* BOSSELMAN & STROUD, *supra* note 222.

226. Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 608 (1965).

227. *See* BOSSELMAN & STROUD, *supra* note 222, at 74.

228. Bosselman & Stroud, *Mandatory Tithes: The Legality of Land Development Linkage*, 9 NOVA L.J.381, 397-99 (1985).

The Florida courts adopted the rational nexus test for impact fees in a series of recent decisions, beginning with *Contractor & Builders Association v. City of Dunedin*.[229] There, the Florida Supreme Court upheld the concept of impact fees, even though it struck down the particular ordinance requiring an impact fee for sewer and water connection, for failing to sufficiently restrict the use of fees collected: "In principle, however, we see nothing wrong with transferring to the new user of a municipally owned water or sewer system a fair share of the costs new use of the system involves."[230] For an impact fee ordinance to be valid, the court held that: (1) new development must generate a need for expansion of public facilities; (2) the fees imposed must be no more than what the muncipality would incur in accommodating the new users of the system; and (3) the fees must be expressly earmarked for the purposes for which they were charged.[231]

These requirements were further refined in *Hollywood, Inc. v. Broward County*,[232] which upheld an ordinance requiring dedication, an in-lieu fee, or an impact fee as a condition of plat approval, to be used for the capital costs of expanding the county park system. The court held that the ordinance was a valid exercise of the police power:[233]

> [W]e discern the general legal principle that reasonable dedication or impact fee requirements are permissible so long as they offset needs sufficiently attributable to the subdivision and so long as the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents. In order to satisfy these requirements, the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision.[234]

Seven months later, another Florida court upheld an impact fee for road improvements in *Home Builders & Contractors Association v. Board of Palm Beach County Commissioners*.[235] The county ordinance required new land development activity generating road traffic (including residential, commercial, and industrial uses) to pay a fair share of the cost of expanding new roads attributable to the new development. The court found that the ordinance met the *Dunedin* tests for a valid im-

229. 329 So. 2d 314 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979).
230. *Id.* at 317-18.
231. *Id.*
232. 431 So. 2d 606 (Fla. Dist. Ct. App.), *cert. denied*, 440 So. 2d 352 (Fla. 1983).
233. 431 So. 2d 606, 611-12 (Fla. Dist. Ct. App. 1983).
234. 431 So. 2d 606, 611-12 (Fla. Dist. Ct. App. 1983).
235. 446 So. 2d 140 (Fla. Dist. Ct. App. 1983), *cert. denied*, 451 So. 2d 848 (Fla. 1984).

pact fee because it recognized that the rapid rate of new development would require a substantial increase in the capacity of the county road system, and tied this need to the new development by a formula based on the costs of road construction and number of motor vehicle trips generated by different types of land use.[236]

b. The "Reasonable Relationship" Test. As a general rule, California courts uniformly had upheld (until *Nollan*) the constitutionality of required dedication or payment of a fee as a condition of land-use approval when the following conditions were met: (1) the municipality is acting within its police power; (2) the conditions have a reasonable relation to the public welfare; and (3) the municipality does not act in an arbitrary manner.

As to the first requirement, the California courts give a broad interpretation to the police power. Rigorous land-use regulations, and development exactions in particular, constitute a proper exercise of the police power. The leading California case is *Associated Home Builders v. City of Walnut Creek*[237] in which the court stated:

> The rationale of the cases affirming constitutionality indicate the dedication statutes are valid under the state's police power. They reason that the subdivider realizes a profit from governmental approval of a subdivision since his land is rendered more valuable by the fact of subdivision, and in return for this benefit the city may require him to dedicate a portion of his land for park purposes whenever the influx of new residents will increase the need for park and recreational facilities. . . . Such exactions have been compared to admittedly valid zoning regulations such as minimum lot size and setback requirements.[238]

As to the second requirement, California only requires that exactions bear *some* reasonable relationship to the needs created by the development. In *Walnut Creek*, the court rejected any direct nexus theory, stating that an ordinance requiring dedication or in-lieu fees "can be justified on the basis of a general public need for recreational facilities caused by present and future subdivisions."[239]

California courts have also upheld the use of impact fees as a proper exercise of a municipality's police power. In *J. W. Jones Co. v. City of San Diego*,[240] the court of appeal held that San Diego could use its police power to impose "facilities benefit assessments" (FBAs) on developers in order to fund a broad spectrum of public improvements including water, sewer, roads, parks, transit and transportation, libraries, fire sta-

236. *Id.* at 144.
237. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).
238. *Id.* at 645, 484 P.2d at 615, 94 Cal. Rptr. at 639.
239. *Id.* at 637, 484 P.2d at 610, 94 Cal. Rptr. at 634.
240. 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (1984).

tions, school buildings, and police stations. FBA payments were earmarked for the area of benefit and solely for the purpose for which the fee was levied. The court rejected a challenge that the FBAs were an invalid tax, finding that a new development paying the fees had adequately benefited from the improvements since the FBAs were tied closely to the planning process. The court also examined the underlying policy of what the city was trying to do in controlling explosive growth: "The vision of San Diego's future as sketched in the general plan is attainable only through the comprehensive financing scheme contemplated by the FBA."[241]

As these decisions demonstrate, the California test grants broad discretion to municipalities in the area of development exactions. Because of the underlying rationale of development as a "privilege," developers rarely succeed in challenging fees imposed as a condition of development. The standard employed by the California courts in reviewing such fees is far less stringent than the rational nexus test applied by the majority of other jurisdictions.[242] Indeed, as one commentator aptly stated, the major legal issue involving development exactions in California "is not whether dedication or the payment of fees as a condition precedent to development can be required, but to what extent and in what amount they can be required."[243] This is what troubled the Supreme Court in *Nollan*.

c. The Specifically and Uniquely Attributable Test. A minority of jurisdictions apply the specifically and uniquely attributable test, primarily in cases involving dedication and/or in-lieu fees. Illinois originally made the most prolific use of this test, as set out in *Pioneer Trust and Savings Bank v. Village of Mount Prospect*.[244] There, a developer challenged the validity of an ordinance requiring subdividers to dedicate one acre per sixty residential lots for schools, parks, and other public purposes. The Illinois Supreme Court held:

> But because the requirement that a plat of subdivision be approved affords an appropriate point of control with respect to costs made necessary by the subdivision, it does not follow that communities may use this point of control to solve all of the problems which they can foresee.[245]

To be considered a reasonable regulation under the police power, re-

241. *Id.* at 758, 203 Cal. Rptr. at 589.
242. Parks v. Watson, 716 F.2d 646, 653 (9th Cir. 1983).
243. Curtin, *Dedications, Exactions and In Lieu Fees: The Inverse Condemnation-Taking Issue* 8–9 (County Counsel Ass'n Spring Conference, Santa Cruz, Cal., May 1986).
244. 22 Ill. 2d 375, 176 N.E.2d 799 (1961).
245. *Id.* at 377, 176 N.E.2d at 801.

quirements imposed upon the subdivider must be within the statutory grant of power to the municipality, and must be "specifically and uniquely attributable" to his development. The need for additional school and recreational facilities, although admittedly aggravated by the 250-unit subdivision, was not specifically and uniquely attributable to the new development and thus, should not be cast upon the subdivider as his sole financial burden. The fact that the present school facilities of Mount Prospect were near capacity was the result of the *total* development of the community. Therefore, the dedication requirement was held to be an invalid taking without just compensation.

Rhode Island adopted the *Pioneer Trust* test in *Frank Ansuini, Inc. v. City of Cranston.*[246] The court struck down a city regulation requiring subdividers to dedicate at least 7 percent of the land area of the proposed plat to the city to be used for recreation purposes. It held that the involuntary dedication of land was a valid exercise of the police power only to the extent that the need for the land required to be donated resulted from the "specific and unique activity attributable to the developer."[247]

By applying the restrictive *Pioneer Trust* test to developer exactions, courts impose substantially the same requirement as a special assessment, thus effectively precluding their use for most extradevelopment capital funding purposes. The *Pioneer Trust* test quickly becomes difficult to reconcile with local governments' planning and funding problems caused by rapidly accelerating development. Consequently, state courts—including those in Illinois[248]—have begun turning away from this restrictive standard as outlined above.[249]

2. "LINKAGE" PROGRAMS

Impact fees should be distinguished from linkage programs, so called because they "link" development approvals to the provisions of some perceived public need—most often, affordable housing—without attempting to draw a "rational nexus" between the development proposed and the public improvement to which it is linked.[250] While such programs have clearly been successful in providing large amounts of

246. 264 A.2d 910 (R.I. 1970).
247. *Id.* at 914.
248. Illinois has since moved closer to a rational nexus test. *See* Krughoff v. City of Naperville, 68 Ill. 2d 352, 369 N.E.2d 892 (1977).
249. Juergensmeyer, *supra* note 223.
250. *See* Kayden & Pollard, *Linkage Ordinances and Traditional Exactions Analysis*, 50 LAW & CONTEMP. PROBS. 127 (1987).

housing in places like San Francisco,[251] there is considerable debate about their legality,[252] and courts in Massachusetts have expressed strong reservations about the constitutionality of such programs.[253] After *Nollan*, the bare "linkage" program is in all likelihood, not only indefensible, but unconstitutional as well.

3. THE *NOLLAN* CASE

Decided on the last day of the Court's 1987 Term, *Nollan v. California Coastal Commission*[254] deals ostensibly with beach access. Plaintiffs sought a coastal development permit from the California Coastal Commission in order to tear down a beach house and build a bigger one. The Commission conditioned the permit on the granting of an easement to permit the public to use one-third of the property on the beach side. For the privilege of substantially upgrading a beach house, the owner was forced to dedicate to the public lateral access over much of his backyard for more beach for the public to walk upon. A California court of appeal had held this was a valid exercise of the Commission's police power under its statutory duty to protect the California coast.

The Supreme Court reversed.[255] Noting that the taking of such an access over private property by itself would require compensation, the Court then examined whether the same requirement, imposed under the police or regulatory power of the Commission rather than under its powers of eminent domain, would modify the "just compensation" requirement.

The direct holding of the Court was that in this case it did not and that compensation was required. The rationale of the Court was critical. The Court observed that land-use regulations do not effect takings if they substantially advance legitimate state interests and do not deny an owner the economically viable use of his land. But even assuming (without deciding) that legitimate state interests include, in the Commission's words, protecting public views of the beach and assisting the public in overcoming the psychological barrier to the beach created by overdevelopment, the Court could not accept the Commission's posi-

251. Thirty million dollars in contributions, 53,000 housing units either rehabilitated, rebuilt, built, or under construction, $40 million collected in Boston, according to representatives of the San Francisco mayor's office and Boston's Redevelopment Authority in a recent presentation at the semiannual meeting of the Urban Land Institute in Honolulu on May 23.

252. Kayden & Pollard, *supra* note 250, at 127.

253. Bonan v. City of Boston, 398 Mass. 315, 496 N.E.2d 640 (1986), reports decision on other grounds. The trial court expressed doubt about the exaction for housing linked to hospital construction.

254. 107 S. Ct. 3141 (1987).

255. *Id.*

tion that there was any *nexus* between these interests and the condition attached to Nollan's beach house redevelopment. The Court observed:

> It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land use power for any of these purposes. *Sic transit* "linkage."[256]

However, said the Court, it is an altogether different matter if there is an "essential nexus" between the condition (read impact fee or exaction) and what the landowner proposes to do with the property:

> Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding the construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.
> . . .The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. . . . [T]he lack of nexus between the condition and the original purpose the building restriction converts that purpose into something other than what it was. The purpose becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them.[257]

In short, the Supreme Court appears to have adopted the "rational nexus" test concerning exactions, in-lieu fees, and impact fees over the broader California rule which apparently affected the imposition of the condition on the Nollan property. The case also means that naked linkage programs[258] which seek to impose fees, dedications, and conditions on the development process, merely because the developer needs a permit and the public sector needs an unrelated public project, are in all probability also illegal. As one well-known commentator suggested with regard to a proposed Chicago linkage program:

256. *Id.* at 3149.
257. *Id.* at 3147–48.
258. *See, e.g.*, BOSSELMAN & STROUD, *supra* note 222, at 381; Valla, *Linkage: The Next Stop In Developing Exactions*, 2 Growth Management Studies Newsletter No.4, June 1987; Kayden & Pollard, *supra* note 250.

> It will be difficult enough to sustain a housing linkage program on the ground that there is a reasonable relationship between the construction of commercial office space and the need for additional housing. It will be even more difficult to demonstrate that connection when the exacted payments are used for a variety of unknown neighborhood development projects.[259]

A more troublesome aspect of the *Nollan* case is its meaning in the regulatory taking context generally. Reconciling the decision with the *Keystone* case can be particularly troubling. After all, if the Court was serious when it said that the indivisible nature of property rights should be considered in assessing the extent of economic loss, then how is it that *Nollan* surmounts the barrier? At most, what has been "taken" is an easement for access certainly less valuable than the mineral rights in *Keystone*, which, in the hierarchy of property rights, is at least a *profit a prendre*.[260] Moreover, as the dissent in *Nollan* points out,[261] the Nollan property is clearly worth more as redeveloped than before, and, even with the contested easement, the economic effect is minimal.

The *Nollan* majority is precious little help in resolving these issues, as several state and federal courts have pointedly observed in the course of their opinions.[262] This is not entirely surprising given that the *Nollan* majority consists of the *Keystone* dissent together with Justice White.[263]

It has been suggested that the *Nollan* case will force local governments to reexamine their "traditional" subdivision exactions, such as for public street dedications, in light of the "essential nexus" test to see if they will withstand a takings challenge.[264] Something of what Justice Scalia meant— and around which he forged his majority in *Nollan*—can be gleaned from his dissent in the recently decided rent control case of *Pennell v. City of San Jose*.[265] In departing from Chief Justice Rehnquist's opinion upholding San Jose's rent control law—particularly that part which appears to uphold the most controversial provision permitting the denial of rent increases on the basis of a tenant's ability to pay—Justice Scalia distinguishes "traditional" land-use regulations which don't "totally destroy the economic value of property," which he is apparently quite willing to accept. He writes:

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259. Smith, *supra* note 224, at 28.
260. II A.L.P. Part. 8, ch. 1.
261. *Nollan*, 107 S. Ct. at 3158 (Brennan, J., dissenting).
262. *E.g.*, Orion Corp. v. Washington, 109 Wash. 2d 621, 747 P.2d 1062 (1987).
263. For further commentary on this and the *Nollan* dissent, *see* Peterson, *Land Use Regulatory "Takings" Revisited: The Three Supreme Court Approaches*, 39 HASTINGS L.J. 335 (1988).
264. BOSSELMAN & STROUD, *supra* note 222.
265. 108 S. Ct. 849 (1988).

> Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly. Thus, the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion.[266]

This language is significant for several reasons. First, Scalia appears to accept the "destruction of all economic use" test set forth in *Keystone*, lacking which a regulation of land is not a taking of property for constitutional purposes. Second, Justice Scalia appears ready to accept a police power basis for a traditional land-use regulation well beyond health and safety, and certinly beyond nuisance. Correcting a social evil is sufficient basis which smacks of general welfare. Third, traditional exactions such as road dedications and setbacks are legal provided there is always some sort of connection—like the need to avoid traffic congestion. This is all a far cry from the more extreme potential interpretations of *Nollan*, and far closer to the views expressed by a majority in *Keystone*, from which Justice Scalia joined in vigorous dissent.

4. RECENT CASES: FEW, NARROW, AND INCONCLUSIVE

After *Nollan*, it may be well-nigh impossible to demonstrate the connection between exacted payments and development projects. While there has been little time for a substantial body of common law to develop around *Nollan*, so far the few cases do not reflect much change in judicial attitude toward regulatory takings. Indeed, some courts appear bent on restricting its application to physical invasion cases, the way the Supreme Court first discussed the issues. In *Grand Forks-Trail Water Users, Inc., v. Hjelle*,[267] the North Dakota Supreme Court dismissed the applicability of *Nollan* to a water line relocation case on the ground that *Nollan* involved a permanent physical occupation, while "the instant case does not involve a permanent physical occupation."[268] An Arizona court of appeals has taken an even broader view in *Westwood Homeowners Association v. Tenhoff*.[269] In an action to close a home for the developmentally disabled on the ground that it violated a restrictive covenant, the court held that state statutes declaring rights of the develop-

266. *Pennell*, 108 S.Ct. at 861 (Scalia, J., concurring).
267. 413 N.W.2d 344 (N.D. 1987).
268. *Id.* at 348.
269. 155 Ariz. 229, 745 P.2d 976 (Ariz. Ct. App. 1987).

mentally disabled to be state policy prevented the enforcement of such covenants. To the claim that this amounted to a taking of property (rights enforceable through covenants) without compensation, the court noted that "a legislative refusal to enforce restrictive covenants against otherwise unobtrusive group homes would substantially advance that interest by promoting the integration of the developmentally disabled into all segments of the community. As the Supreme Court recently stated, "We have long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land. . . .'"[270]

Similarly, the Georgia Supreme Court held the *Nollan* case inapplicable to a loss of a right of access through the destruction of a nonconforming building,[271] and the Mississippi Supreme Court found nothing in *Nollan* "which requires a different result" in denying that a requested zoning reclassification from residential to commercial did not amount to a confiscatory taking of property without compensation.[272]

Finally, the California courts are testing the extent of the *Nollan* "nexus" language by upholding a California Coastal Commission permit requirement that clubs impose membership conditions precluding discrimination in order to obtain a Commission development permit.[273] One court reasoned that:

> Here, in contrast [to *Nollan*] there is a direct connection between the governmental purpose of maximizing public access to state beach land, and the condition which was imposed. Again, by precluding discrimination against minorities in the club's membership policies, the Commission maximized the possibility that all segments of the public will have access to the legal land.[274]

An appellate case interpreting *Nollan* more narrowly is easily distin-

270. *Id.* at 236, 745 P.2d at 983 (quoting *Nollan*, 107 S. Ct. at 3146).

271. Atlanta Bd. of Zoning Adjustment v. Midtown North, Ltd., 257 Ga. 496 n.2, 360 S.E.2d 569, 570 n.2 (1987). However, at least one justice of the Atlanta Supreme Court would interpret *Nollan* more restrictively, though he has erroneously read the case. In Turner v. City of Atlanta, 257 Ga. 306, 357 S.E.2d 802 (1987), Justice Smith based a dissent in part on his reading *Nollan* to "imply that if the government takes property, whether in the form of a physical taking or a regulatory taking, by zoning or otherwise, be it temporary, or permanent, *partial or whole*, the government must compensate the citizen for the taking." 357 S.E.2d at 803 (emphasis added). This, of course, flies in the face of the Court's unambiguous "regulatory taking" standard in *Keystone*, 107 S. Ct. at 1246-50 (1987), discussed in Part B of this article.

272. Saunders v. City of Jackson, 511 So. 2d 902 n.3 (Miss. 1987).

273. Jonathan Club v. California Coastal Comm'n, 197 Cal. App. 3d 884, 243 Cal Rptr. 168 (1988).

274. *Id.* at 178, 243 Cal. Rptr. at 177.

guishable because it deals solely with the question of who should pay for public access.[275]

The question remains, can governments condition building subdivisions upon dedicating public parks? Of course they can, if the subdivision generates a need for a park and its residents will derive some benefit from it. Can governments condition building a new high-rise upon the setting-aside of 20 percent of the units for low-income families? Probably not. There is a "nexus" between condition, problem, or need, and development in the former that is lacking in the latter. Is it *wise* for governments to do *either* the former or the latter? That is a matter of land policy—upon which the Constitution is, thankfully, so far silent, and upon which the Supreme Court has said, thankfully, very little.

In sum, the law of takings is increasingly consistent in its return to the law as it was before *Pennsylvania Coal*. Until that case, the Supreme Court never had thought to characterize a regulation as a potential fifth amendment taking, and to circumscribe that jurisprudential aberration, represents a needful correction to that judicial avulsion from which states had been shifting away by accretion for half a century. The *Nollan* and *First English* cases coupled with the Brennan dissent in *San Diego Gas & Electric* constitute a warning to those state and local government agencies that are tempted to misuse the police power in land-use regulations. But it is the *Keystone* case that sets out stringent limits to the application of the takings clause at all, and there is nothing in either *First English* or *Nollan* to gainsay those limits. The question never was, what has the owner lost. Nor has it been, until recently, has the government left any use of the property. Rather, the first and preeminent question is and always was: does the regulation represent a proper exercise of the police power?

V. Conclusion

The decline of private property rights in an urbanizing America may be inevitable. The proximity of uses in an urban area makes land-use controls under the police power a public necessity, whether by means of zoning, subdivision controls, building codes, or housing codes. This does not mean that all such police power regulation on the use of land is well-founded and legally defensible. However, it most certainly does

275. Augustson v. King County, 49 Wash. App. 409, 743 P.2d 282 (1987). The Maryland Court of Appeals also cited *Nollan* in Maryland Port Admin. v. Q.C. Corp., 310 Md. 379, 529 A.2d 829 (Md. Ct. Spec. App. 1987), but only for the obvious proposition (after *Keystone* and *First English*) that a taking can occur without a physical invasion.

not mean that declaratory relief for the landowner, and the occasional injunction or writ of *mandamus*, will almost always suffice. When governments act maliciously, other remedies may be necessary.[276] This is, however, no reason to take an "implacable stand against zoning"; it is the reason why such regulation should indeed remain, for the most part, "outside the eminent domain clause" of the Constitution.[277] Perhaps Professor Grey is right—though the word "taking" should not be used in quite so cavalier a fashion—in framing the issue as follows:

1. Is there a prima facie governmental taking of private property?
2. If so, is it justified by the police power?
3. If not, is it a taking for a legitimate public purpose?
4. If so, has there been just compensation?[278]

The *Keystone* case at least suggests that the Supreme Court is close to adopting the first two steps of Grey's analytical framework when it is alleged that a regulation takes property rights. Even the *First English* decision concedes that the state's regulatory authority may "insulate" it from having to pay compensation for the rare regulatory taking. Unfortunately, the same decision reflects the views in *Berman* and *Midkiff* that for eminent domain purposes, the third inquiry—into public purpose—is judicial history, leaving only the fourth: has there been just compensation. At least, the *Teleprompter* decision leaves property owners with compensation, no matter how slight the physical invasion.

In sum, that the Supreme Court has affected private property rights fundamentally is undeniable. The fundamental shift appears to be *away* from the takings notions of *Pennsylvania Coal* via *Keystone*, rather than towards them, via *Nollan* and *First English*. In this shift, the Court's major physical takings cases, from *Loretto* to *Midkiff* (with the possible exception of *Granite Rock*), are remarkably consistent: a (proper) land-use regulation is valid *and* noncompensable so long as there remains some private use in the land. That was the law *before Pennsylvania Coal*, and that is the law today. There is precious little indication in recent Supreme Court decisions to demonstrate that the law will be much different tomorrow.

More troublesome is the erosion of private property rights by agencies of the federal government—and more difficult to defend. Here, the

276. See Justice Stevens' dissent in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). For a general defense of such land-use regulations and why it is that compensation is not required, *see* Williams, Smith, Siemon, Mandelker & Babcock, *supra* note 109.

277. Epstein, *supra* note 4, at 17.

278. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV.21, 29 (1986).

intrusion comes not so much in urban, but in rural areas where private land uses are under broad attack on much of the nation's federal public lands, particularly in national parks. While it is possible to trace such intrusions to concerns for protecting "what's left" spawned by the development, if not urbanization, of other parts of the country, this is probably too tenuous if not downright simplistic. The British have a far more urban population and on far less land, yet most of its parks are on private land with a variety of private land uses permitted thereon, from farming to mining.[279]

That the federal government needs to be curbed generally, its modern tendency to intrude into not only private but state and local government spheres as well, is increasingly evident. It should start by reexamining some of its land-use policies in light of their often needlessly adverse effects on private property rights. Although we probably must regulate, it is worth taking care that in this period of critical examination of our constitutional values and protections, we do not lose by degrees what our founding fathers sought to protect in a more simple time and more rural place. There are many values and rights enshrined in that Constitution. Lest we forget, private property is one of them.

279. For descriptions of such parks and the planning control framework in which they fit, *see* CULLINGWORTH, TOWN AND COUNTRY PLANNING IN BRITAIN ch. 10 (1979); THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH 133-35 (Reilly ed. 1973); F. BOSSELMAN, IN THE WAKE OF THE TOURIST: MANAGING SPECIAL PLACES IN EIGHT COUNTRIES, ch. 9 (1978); HEAP, AN OUTLINE OF PLANNING LAW (1985); GRANT, URBAN PLANNING LAW 304 (1982).